No. 02-35269

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES LOMBARDO, Plaintiff-Appellant, v. BRUCE WARNER, in his official capacity as Director of the Oregon Department of Transportation, Defendant-Appellee.	No. 02-35269 CV 98-3001 MRH (D. Oregon, Medford)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
HONORABLE JOHN P. COONEY, U.S. MAGISTRATE JUDGE,
PRESIDING

APPELLANT'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING AND

PETITION FOR REHEARING EN BANC

1. Conflicts with United States Supreme Court Decisions

The panel decision conflicts with decisions of the United States Supreme Court—Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed.2d 800 (1981); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed.2d 771 (1988); FW/PBS, Inc. v. Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed.2d 603 (1990); City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2018, 129 L. Ed.2d 36 (1994); and Thomas v. Chicago Park District, 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed.2d 783 (2002)--and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

A. Content-Based Distinctions

This decision marks the first time that this court has banned political speech where commercial speech is permissible.

i. On-Site versus Off-Site

As the dissenting opinion indicates, Mr. Lombardo may display a 60 square foot sign advertising a product or service that he sells at his residence, but he may not display "For Peace in the Gulf" or "Vote Bush."

In Metromedia, six justices of the Supreme Court agreed that the First Amendment affords greater protection to noncommercial signs than commercial signs. 453 U.S. at 513 (plurality opinion); id., at 536 (Brennan, J., concurring in the judgment). This court adopted this reasoning. See National Advertising Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir. 1988). By allowing commercial messages where noncommercial messages are not allowed, this court now "inverts" this First Amendment reasoning.

The Supreme Court stated:

> "The fact that [a government] may value commercial messages relating to onsite goods and services more than it values commercial communications relating to offsite goods and services does not justify prohibiting an occupant from displaying its own ideas or those of others." Metromedia, 453 U.S. at 513.

ii. Exceptions in the Oregon Act

ORS 377.735(1)(a) provides that the permit requirements do not apply to government signs. (See the dissenting opinion, at n.3.) Hence, a city may post noncommercial speech stating "Drive Safely,"(or even commercial speech stating "Buy Tickets to the City Dance"), but Mr. Lombardo is

barred from posting "Warning, Traffic Police Ahead." Thus, by denying Mr. Lombardo's sign, Oregon impermissibly regulates noncommercial speech based upon its content in violation of Metromedia.

B. Unbridled Discretion

i. Variances

ORS 377.735(2) allows a variance "for good cause shown." A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards is unconstitutional. See City of Lakewood v. Plain Dealer Publishing Co., supra at 757; Desert Outdoor Advertising Co. v. City of Moreno Valley, 103 F.3d 814, 818-19 (9th Cir. 1996), cert. denied, 522 U.S. 912 (1997).

As the dissent in this case points out, the variance provision allows a government official to grant or deny a variance merely by stating that "good cause" has or has not been shown. The majority relies upon ORS 377.735(2) which prohibits government officials from considering the content of signs in deciding whether to allow a variance.

But this court has recognized that the mere possibility of exercising discretion against unfavored speakers (even if content is not considered) is the First Amendment violation. See, e.g., N.A.A.C.P. Western Region v. City of Richmond, 743 F.2d 1346, 1357 (9th Cir. 1984); U.S. v. Linick, 195

F.3d 538, 542 (9th Cir. 1999); and Young v. City of Simi Valley 216 F.3d 807, 819 (9th Cir. 1996). Indeed, it is precisely because a government official has the discretion to rule against an unfavored speaker that we can never know whether discretion was used because of likely content. U.S. v. Linick, supra at 242.

ii. Time Limits on Application for Variance

In Thomas v. Chicago Park District, supra the Supreme Court noted that even content-neutral time, place, and manner restrictions must contain adequate standards to guard against licensing officials enjoying unduly broad discretion to determine whether to grant or deny a permit.

The failure to place limitations on the time within which the licensing official must act is a species of unbridled discretion. FW/PBS, Inc. v. Dallas, supra at 223-24.

Under the Oregon Act, the licensing official can hold on to an application for a variance, and never rule on it, thus denying the applicant the right to display the sign.

The majority, at n.6, relies on Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 613 (9th Cir. 1993), a case in which both the litigants and this court were unable to find any of the many cases on this issue. Ibid.

However, Thomas v. Chicago Parks District, supra, invalidates this holding of Outdoor Systems.

C. Absolute Right to Display Sign at Residence

In City of Ladue v. Gilleo, supra, the Supreme Court held that a government may not limit the rights of individuals to display signs at their residences. Even if he were granted a variance, Mr. Lombardo would be able to display his sign for only 60 days. See OAR 734-060-0175(3)(a). City of Ladue recognizes no such durational limitation. Indeed, a presidential election campaign period now lasts for 18 months before the election (and 60 days after the election.) A 60-day durational limit would severely hamper the rights of a resident who wants to display a "Sharpton for President" sign. The majority failed to consider this issue.

2. Conflicts with Decisions of this Court

The panel decision conflicts with decisions of this court—N.A.A.C.P. Western Region, supra; Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. 1988); Desert Outdoor Advertising v. City of Moreno Valley, supra; Young v. City of Simi Valley, supra; U.S. v. Linick, supra, and Clear Channel, Inc. v. City of Los Angeles, 340 F.3d 810 (9th Cir. 2003)--and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

A. Meaning of Content-Based

In Foti v. City of Menlo Park, supra at 637 this court set forth the test to determine whether a regulation of signs is content-based—if the law enforcement officer must read the sign's message to determine whether the sign is permissible, the sign is content-based. As the dissenting opinion points out, the majority ignores this precedent.

B. Wholesale Exemption for Government Speech

In Foti, supra at 637, this court noted the First Amendment violation created by a "wholesale exemption for government speech." Oregon has the same exemption—ORS 377.735(1)(a). The dissenting opinion, at n.3, recognizes this problem with the Oregon Act.

C. Standard of "For Good Cause Shown"

As shown above, there is no standard for allowing a variance other than "for good cause shown." The majority's approval of the variance provision conflicts with Desert Outdoor Advertising v. City of Moreno Valley, supra at 818-19, which found unbridled discretion in similar subjective standards. The dissenting opinion, at n.12, notes that the majority cites no case that sets forth adequate guidelines for the meaning of "good cause shown."

D. Possibility of Exercising Discretion Against Unfavored Speakers

In upholding the variance provision, the majority relies upon ORS 377.735(2), which states that content may not be a factor in determining whether a variance should be granted.

The majority opinion thus conflicts with N.A.A.C.P. Western Region, supra; U.S. v. Linick, supra, and Young v. City of Simi Valley, supra, which hold that the mere possibility of exercising discretion against unfavored speakers (even if content is not considered) is the First Amendment violation. Indeed, this court has held that it is precisely because a government official has the discretion to rule against an unfavored speaker we can never know whether the discretion was used because of likely content. U.S. v. Linick, supra at 242.

E. Disallowing Noncommercial Speech Where Commercial Speech is Permissible

As the dissent notes, this court has never upheld a billboard statute that applies an onsite/offsite distinction as the Oregon Act has. Indeed, this court has never approved a regulatory scheme in which noncommercial speech is disallowed where commercial speech is permissible. As the dissent points out, even in Clear Channel Inc. v. City of Los Angeles, supra,

relied upon heavily by the majority, Los Angeles permitted noncommercial speech on all signs.

3. This Case Involves Questions of Exceptional Importance

This case involves whether the onsite/offsite distinction violates the First Amendment, an issue on which the panel decision conflicts with authoritative decisions of other United States Courts of Appeals.

The dissenting opinion, at n.10, notes that other circuits are split on whether the onsite/offsite distinction is itself unconstitutional. Ackerley Communications of Mass., Inc. v. City of Cambridge, 88 F.3d 33, 37-38 (1st Cir. 1996), invalidated a city billboard ordinance that applied an onsite/offsite distinction to noncommercial messages. See, also, National Advertising Co. v. Town of Babylon, 900 F.2d 551, 556-57 (2nd Cir. 1990), noting that noncommercial messages must be allowed wherever commercial messages are allowed.

The opinions of the Third, Sixth, and Eleventh Circuits cited by the dissent at n.10 were all decided prior to City of Ladue, supra, in which a majority of the justices upheld the plurality opinion of Metromedia, supra.

4. Conclusion

For the reasons stated herein, the decision of the panel should be reheard and should be reheard en banc.

Dated: January 2, 2004.

Alan R. Herson
Attorney for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

TO FED. R. APP. 32(a)(7)(C) and CIRCUIT RULE 32-1

I certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached APPELLANT'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC is proportionately spaced, has a typeface of 14 point or more, consists of 9 pages, and contains 1,561 words.

Dated: January 2, 2004.

Alan R. Herson
Attorney for Plaintiff/Appellant

No. 02-35269

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES LOMBARDO,

Plaintiff-Appellant,

v.

BRUCE A. WARNER, in his official capacity as Director of the Oregon Department of Transportation,

Defendant-Appellee.

RESPONSE TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appeal from the United States District Court for the District of Oregon

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RESPONSE TO PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

STATEMENT OF THE CASE

A. Introduction; background

This case involves a First Amendment challenge to the constitutionality of the Oregon Motorist Information Act (OMIA), Or. Rev Stat. § 377.700 to § 377.830. The panel's decision includes a brief summary of the OMIA. *Lombardo v. Warner,* 353 F.3d 774, 775-76 (9th Cir. 2003).[1] In general, the OMIA regulates and limits signs that are visible from state highways. It permits "on-premises signs" (which relate to some activity on the premises) while restricting "outdoor advertising signs" (which are not so related). Or. Rev. Stat. § 377.710(22); Or. Rev. Stat. § 377.735(1)(c). The panel majority noted that "a sign is permissible [under the Act] without a permit or variance, irrespective of the commercial or non-commercial nature of the sign, if it identifies activities conducted on the premises" *Lombardo,* 353 F.3d at 776.

Also excepted from the general prohibition on off-premises, or "outdoor advertising," signs are "temporary sign[s] on private property," that do not exceed 12 square feet in size. Or. Rev. Stat. § 377.735(1)(b)(A). A variance

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[1] A somewhat more extensive overview is set out in the appellee's brief. (Appellee's Br. 13-16).

from that size limitation may be obtained from the Department of Transportation "for good cause shown." Or. Admin,. Rule § 734-060-0175(3).[2] An example of "good cause" given in the rule is that "the content of the sign will not be visible to the public if the sign is 12 square feet or less[.]" *Id.* In deciding whether to grant a variance, the Department "shall not consider the content of the sign[.]" Or. Rev. Stat.§ 377.735(2).

In this case, plaintiff has alleged that he intends to display a 32-square-foot sign at his home reading "For Peace in the Gulf," and that the OIMA impermissibly prevents him from doing so. The district court granted defendant's motion to dismiss for failure to state a claim. *Lombardo,* 353 F.3d at 775, 776.

In essence, plaintiff has claimed on appeal that the onsite/offsite distinction drawn in the OMIA is a content-based distinction, and that the variance procedure for temporary signs exceeding 12 square feet gives the agency "unbridled discretion to grant permit applications." *Id.* at 778. The panel majority rejected both contentions, concluding that the onsite/offsite

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[2] Appellant's petition indicates that, even with a variance, he "would be able to display his sign for only 60 days." (Pet. 5). That is incorrect. Because appellant intends to display his sign at his home, the 60-day provision does not apply at all. Or. Rev. Stat. § 377.735(1)(b)(C) ("a sign erected by a resident on the resident's residential property may remain in place for longer than 60 days in a calendar year").

distinction is not a content-based one, and that "[t]he OMIA defines on premises [or onsite] signs with respect to location alone, not content." *Ibid.* The majority also rejected plaintiff's claim that the variance procedure gives the agency unbridled discretion. The majority noted that "the OMIA expressly precludes content-based decisions by prohibiting officials from 'consider[ing] the content of the signs in deciding whether to allow a variance.' Or. Rev. Stat. § 377.735(2)." *Ibid.*

One member of the panel dissented, disagreeing with both of the majority's major conclusions. *Lombardo,* 353 F.3d at 779-88 (B. Fletcher, J., dissenting). She determined that "the OMIA's onsite/offsite distinction does not allow non-commercial speech wherever a commercial message would be permissible." *Id.* at 780. Relying in part on exceptions contained in the OMIA for certain signs, she also concluded that the OMIA "draws content-based distinctions among non-commercial messages." *Id.* at 781. Judge Fletcher also derived that conclusion from the fact that "the statute's basic distinction between onsite and offsite messages depends for its enforcement on an examination of the content of every noncommercial billboard." *Id.* at 782 (footnote omitted). With regard to the variance procedure, she decided that the procedure lacks "objective, judicially-enforceable standards[.]" *Id.* at 787. She

did not believe that the OMIA's "promise of content neutrality" was sufficient. *Id.*

In his petition, plaintiff raises some, but not all, of the same points made by the dissenting panel member. He adds the claims that he has an "absolute right" to display any sign at his residence, and that the variance procedure is flawed because it does not provide a time limit for agency action on a request for a variance. (Pet. 4-5). He contends that the panel majority's decision conflicts with decisions of the Supreme Court, this court, and other circuit courts of appeal. (Pet. 1, 5, 8). As shown below, he is wrong.

B. Several of the points stressed by the panel dissent were not raised by plaintiff and therefore should have played no role in the analysis; plaintiff never mentions another claim in his petition.

One of the major analytical props of the panel dissent's conclusion that the OMIA is content-based was to focus on exceptions for certain signs that are contained in the OMIA. The dissent listed the exception for "business identification signs," Or. Rev. Stat. § 377.726(1)(a), "for offsite non-commercial signs posted by governmental entities," Or. Rev. Stat. § 377.735(1)(a), and for "small offsite signs that 'provide information for the safety and convenience of the public,' Or. Rev. Stat. § 377.735(4)." *Lombardo*, 353 F.3d at 779, 781, 782 n. 3. Only the last of those three exceptions was even mentioned in plaintiff's opening brief. For that reason, the majority correctly

refused to consider or "discuss the governmental exception, Or. Rev. Stat. § 377.735(1)(a), under the OMIA." *Id.* at 775 n. 1. The dissent also should not have considered either that exception or the exception for "business identification signs." *See Entertainment Research v. Genesis Creative Group,* 122 F.3d 1211, 1217 (9th Cir. 1997), ("We review only issues which are argued specifically and distinctly in a party's opening brief"); *Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir. 1994) (same). Those provisions of the OMIA, and the effect they might have on the constitutional analysis, were nowhere mentioned in plaintiff's opening brief. This court has said that it "'will not manufacture arguments for an appellant.'" *Kohler v. Inter-Tel Technologies,* 244 F.3d 1167, 1182 (9th Cir. 2001), quoting *Greenwood,* 28 F.3d at 977. But the panel dissent did just that.[3]

Plaintiff did mention in his opening brief the exception for small offsite signs designed to "provide information for the safety and convenience of the

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[3] The panel dissent notes that although plaintiff "does not point specifically" to the exception for government signs, "the state draws our attention to it in its own brief." *Lombardo*, 353 F.3d at 782 n. 3. If the dissent means to suggest that the state raised the issue, it did not. The state merely mentioned that exception in passing, when outlining the provisions of the OMIA. (Appellee's Br. 15). The state never raised any "issue" regarding that, or any other, exception. *Cf. In Re Riverside-Linden Inv. Co.,* 945 F.2d 320, 324 (9th Cir. 1991) (court has discretion "to review *an issue* not raised by an appellant . . . when it is raised in the appellee's brief") (emphasis added; citation omitted).

public." Or. Rev. Stat. § 377.735(4). (Opening Br. 11). But he did so in a spare, three-sentence, paragraph, that referenced a related administrative rule, rather than the statute, and that rather summarily concluded that the rule "add[ed] additional content-based distinctions that result in additional reasons why Oregon's regulation of signs violates the First Amendment." (Opening Br. 11). He also never mentions that claim, or the exception, in his petition seeking rehearing. Thus, the claim appears to be a mere afterthought, at most tangential to plaintiff's major claims, and perhaps now abandoned.

Indeed, the only exception plaintiff mentions in his petition is the one for government signs. (Pet.2-3, 6). As noted above, however, petitioner never included any claim related to that exception in his opening brief, so it is not properly before this court.

In sum, the dissent erred by inventing arguments and claims for plaintiff that can nowhere be found in his opening brief. The only claim relating to an exception to the OMIA that is mentioned in that brief is not developed, appears to have been advanced only in passing, and disappears from the petition. A major analytical prop of the dissent's constitutional analysis focuses on exceptions to the OMIA, but the majority correctly did not consider any of those exceptions, and the dissent should not have considered them either. This court should not grant rehearing or rehearing en banc to consider any of those

issues, and if rehearing is granted, those claims and those exceptions should play no role and should receive no consideration.

C. The onsite/offsite distinction drawn by the OMIA is not content-based; the panel's decision does not conflict with other decisions from this court or the Supreme Court.

The panel majority rejected plaintiff's claim – endorsed by the dissent – that the onsite/offsite distinction itself is content-based and that it favors commercial over non-commercial speech. *Lombardo*, 353 F.3d at 777-78. The majority was correct, and its conclusion is not contrary to decisions either from this court or the Supreme Court.

In *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813-14 (9th Cir. 2003), this court observed that

> there is nothing novel or constitutionally infirm about [the city's] use of the on-site/off-site distinction. The Supreme Court, the Ninth Circuit, and many other courts have held that the on-site/off-site distinction is not an impermissible content-based regulation. In the leading Supreme Court case on the regulation of outdoor advertising, the plurality opinion found it permissible to distinguish between on-site and off-site commercial signs, while declaring a San Diego ordinance unconstitutional because of its general ban on noncommercial signs. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511-14 (1981). There is no support in *Metromedia* for the proposition that the on-site/off-site distinction *itself* places an impermissible content-based burden on noncommercial speech.
>
> We have relied on *Metromedia* to uphold sign ordinances that distinguish between on-site and off-cite signs when that distinction does not also prevent the erection of onsite noncommercial signs. *See Ackerley Communications of the*

> *Northwest, Inc. v. Krochalis,* 108 F.3d 1095 (9th Cir. 1997); *Outdoor Systems, Inc. v. City of Mesa,* 997 F.2d 604 (9th Cir. 1993).

(Emphasis in original; footnote omitted).

In this case, the majority simply, and correctly, concluded that "*Clear Channel* is controlling." *Lombardo,* 353 F.3d at 778. Far from straying from either Supreme Court or this court's precedent, the majority's decision is firmly grounded in both.[4] *See also National Advertising Co. v. City of Orange,* 861 F.2d 246, 247 (9th Cir. 1988) (city's ordinance prohibits all signs "relating to activity not on the premises on which the sign is located;" "[w]hether the message on the signs is commercial or noncommercial is irrelevant"); *Outdoor Systems, Inc. v. City of Mesa,* 997 F.2d 604, 612 (9th Cir. 1993) ("The codes do not discriminate against either category [of commercial and non-commercial signs]; they merely distinguish between onsite and offsite commercial speech").

Nor is the circuit split noted by the dissent and by plaintiff in his petition either as deep or as profound as the dissent and plaintiff suggest. *Lombardo,*

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[4] The dissent suggests that "*Clear Channel* does not control the result here," dismissing its decision regarding the permissibility of an onsite/offsite distinction as mere "dicta." *Id.* at 785-86. But a published decision from this court should not be so easily swept aside. *Clear Channel* decided the issue on its merits, and although the ordinance at issue in that case had been amended to, in effect, exempt non-commercial signs from the off-site prohibition, this court did not base its decision upholding the onsite/offsite distinction on that exemption. 340 F.3d at 812-14.

353 F.3d at 784-85 n.10; (Pet. 8). The only case cited by the dissent as being at odds with the decision of the panel majority on this point is the First Circuit's decision in *Ackerley Communications*. But that case may well be distinguishable because there the city admitted that "most on-premise signs are commercial in nature and most noncommercial messages are off-premise[.]" 88 F.3d at 37 n. 7. The court relied on that admission in concluding that the onsite/offsite distinction at issue there did favor commercial over non-commercial speech. There is no such admission in this case, and this court has rejected claims based on mere "speculation" that an onsite/offsite distinction will have the incidental effect of leading to more commercial, than non-commercial, signs. *Outdoor Systems, Inc. v. City of Mesa,* 997 F.2d 604, 612 (9th Cir. 1993).[5]

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[5] In claiming that there is an inter-circuit split, plaintiff also relies on *National Advertising Co. v. Town of Babylon,* 900 F.2d 551, 556-57 (2nd Cir. 1990) (Pet. 8). That decision, however, provides so little information about the content of the Islep city ordinance that was at issue that it is difficult to assess the basis of the decision. It does not appear to be based on any conclusion that an onsite/offsite distinction is impermissible, or to be in conflict with the majority's decision in this case or with *Clear Channel.*

D. A sign is not content-based merely because it must be read in order to determine if it complies with a sign regulation; the panel's decision does not conflict with other decisions from this court.

Both the dissent and plaintiff's petition also contend that simply because a sign must be read to determine whether it is an onsite or an offsite one, for that reason alone the OMIA and its onsite/offsite distinction are impermissible. *Lombardo,* 353 F.3d at 782; (Pet. 6). Both the dissent and plaintiff rely on *Foti v. City of Menlo Park,* 146 F.3d 629 (9th Cir. 1998) for that proposition and suggest that the panel majority's decision is in conflict with *Foti.* But that is a misreading of that case.

Admittedly, in *Foti* this court said that the city's exceptions for certain signs were "content-based because a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance." 146 F.3d at 636 (footnote omitted). That statement must be considered in context, however. When the court made that statement in *Foti* the court already had concluded that the exceptions to the ordinance were content-based and that fact meant that the ordinance itself also was content-based. *Id.* Thus, in context, what *Foti* and other similar cases mean is that if a law or ordinance depends on content-based distinctions, then examining the content of the sign to see whether the law or ordinance applies also will be a content-based determination. The precondition for the rule is that the law or ordinance itself must depend on a content-based

distinction. *See also Desert Outdoor Advertising v. City of Moreno Valley,* 103 F.3d 814, 820 (9th Cir. 1996); *National Advertising,* 861 F.2d at 248 (which are similar to *Foti* in this regard and which should be understood in the same way).

The dissent also suggests that a sign regulation is not "necessarily content-neutral because it is viewpoint neutral," and criticizes the majority for relying on *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 642 (1994), for that proposition. *Lombardo,* 353 F.3d at 782 -83 n. 5. The dissent admits, however, that "*Turner Broadcasting* does state that the 'principal inquiry in determining content neutrality' is 'whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys[.]'" *Id.* at 782 n. 5, quoting *Turner Broadcasting*, 512 U.S. at 642. That statement from *Turner Broadcasting* is fully consonant both with other Supreme Court decisions and with other decisions issued by this court. *See Ward v. Rock Against Racism*, 491 U.S. 789, 791-92 (1989) ("The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation because of disagreement with the message it conveys"); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense to others"); *Edwards v. City of Coeur*

D'Alene, 262 F.3d 856, 862 (9th Cir. 2001) (citing *Rock Against Racism* for the proposition that the principal inquiry is whether the "government has adopted a regulation of speech because of the message it conveys"); *Foti*, 146 F.3d at 636 (quoting *Turner Broadcasting*, 512 U.S. at 643, for the proposition that, "'[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based'").

E. The variance procedure for temporary signs larger than 12 square feet specifically prohibits any consideration of the sign's content; thus, it does not vest any official with too much discretion or create a risk that any sign will be treated differently based on its content.

Both the dissent and plaintiff also contend that the variance procedure for temporary signs larger than 12 square feet is constitutionally flawed because "it requires a showing of 'good cause' [and] vests unbridled discretion in Department of Transportation officials to determine what constitutes 'good cause.'" *Lombardo*, 353 F.3d at 786. (Pet. 3-4, 6). As the panel majority held, that claim is unpersuasive here because the OMIA "expressly precludes content-based decisions by prohibiting officials from 'consider[ing] the content of the signs in deciding whether to allow a variance.' Or. Rev. Stat. § 377.735(2)." *Id.* at 778. That decision is correct, and it does not conflict with any other decision from this court or the Supreme Court.

As the majority recognized, "[l]icensing procedures are invalid if the government official authorizing such permits is given 'unbridled discretion' in

deciding whether to deny or permit the expressive activity at issue." *Id.* at 778, citing *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 759 (1988).

> The danger is that absent standards controlling the exercise of discretion, government officials may determine "who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *Id.* at 763-64. The OMIA does not pose the danger identified in *Lakewood*. * * * [T]he OMIA expressly precludes content-based decisions by prohibiting officials from "consider[ing] the content of the signs in deciding whether to allow a variance." Or. Rev. Stat. § 377.735(2).

Lombardo, 353 F.3d at 778. Because "the danger identified in *Lakewood*" and other cases is not present, the majority's conclusion is right, and its decision does not conflict with *Lakewood* or any other similar decision. *See also FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 226 (1990) (relied on by plaintiff, and citing the same danger, that is, that without adequate standards to guide discretion a government official's distaste for the content of speech will lead to its suppression).[6]

Plaintiffs suggests that the panel majority's conclusion conflicts with three prior decisions of this court (Pet. 3-4), but he is incorrect. In *Young v. Simi Valley*, 216 F.3d 807, 819 (9th Cir. 2000), the ordinance delegated

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[6] The dissent essentially wrote the guarantee of content-neutrality out of the statute. 353 F.3d at 786-87. That guarantee itself is a "'narrow, objective, and definite standard[] to guide the licensing authority[.]'" *Ibid.*, quoting *Desert Outdoor*, 103 F.3d at 818-19, and *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-51 (1969).

essentially limitless discretion to private parties. In *United States v. Linick,* 195 F.3d 538, 541 (9th Cir. 1999), the regulation "contain[ed] language that effectively permit[ted] a governmental authority – in th[at] case the Forest Service – to attach any 'terms and conditions' to a permit" for "an unlimited number of reasons[.]" In *NAACP Western Region v. City of Richmond,* 743 P.2d 1346, 1357 (9th Cir. 1984), even the city admitted that its ordinance, which gave officials "discretion" to waive a permit requirement if "unusual circumstances" were found, "grant[ed] officials unfettered discretion to restrict speech." The ordinances and regulations at issue in those cases are not similar to the content-neutral provision at issue here, and therefore the decisions are in no way in conflict with this one.

F. None of the other issues raised by plaintiff warrants en banc review.

Plaintiff contends that the variance procedure in the OMIA is invalid because it does not place any time limit on when the agency must act on an application for a variance. (Pet. 4-5). He acknowledges that, as the majority in this case held, 353 F.3d at 779 n. 6, this court has rejected such a claim in the past. (Pet. 4). *Outdoor Systems, Inc.,* 997 F.2d at 613 (holding that the failure to specify a time period for processing permit applications for signs does not render a statute or ordinance unconstitutional). He contends, however, that

Outdoor Systems is inconsistent with the Court's subsequent decision in *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002). He is wrong.

In *Thomas,* as plaintiff notes, the Court observed that "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression." 534 U.S, at 323. The danger is that an official "will favor or disfavor speech based on its content." *Id.* (citation omitted). As discussed above, that danger is not present here. The variance procedure contained in the OMIA is not merely "content-neutral," it is content-blind. In granting or denying a variance, the agency cannot consider content. Thus, the danger that the agency will favor or disfavor any particular speech or message also is not present. *See New England Reg. Council of Carpenters v. Kinton,* 284 F.3d 9, 21 (1st Cir. 2002) (in *Thomas*, "the Court clarified that *Freedman*'s procedural requirements do not apply to permit schemes that eschew any consideration of the content of speech").[7]

Plaintiff hypothesizes that some Oregon official might "hold onto an application for a variance, and never rule on it," apparently because of its content. (Pet. 4). Such an action, of course, would violate the OMIA's mandate that content not be considered. Moreover, as the Court indicated in

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[7] The reference is to *Freedman v. Maryland,* 380 U.S. 51 (1965).

Thomas, such an "abuse must be dealt with if and when a pattern of unlawful favoritism appears[.]" 534 U.S. at 325. No such pattern is evident here.

Plaintiff's remaining claim is that he has an "absolute right" to display any sign at his residence. (Pet. 5). He relies on *City of Ladue v. Gilleo,* 512 U.S. 43 (1994), but that decision does not support plaintiff's claim. In that case, the Court emphasized that "[i]t is common ground that governments may regulate the physical characteristics of signs," including those displayed at residences. 512 U.S. at 48. Plaintiff's sign cannot be displayed because it is too big. That is, it is a physical characteristic of his sign that it being regulated, not its content. *City of Ladue,* thus, is not in conflict with the panel's decision in this case. *See also American Legion Post 7 of Durham v. City of Durham,* 239 F.3d 601, 611 (4th Cir. 2001) (relying on *City of Ladue*, 512 U.S. at 58 n. 17, for the proposition that "'mere regulations [of signs on private property] short of a ban'" are permissible).

CONCLUSION

For the reasons given above, as well as those given in the panel majority's decision and in the appellee's brief, the panel majority's decision is correct, it does not conflict with other decisions from this court or the Supreme Court, and if there is an inter-circuit split, it is a shallow and ill-defined one. In sum, neither rehearing nor rehearing en banc is warranted in this case.

Respectfully submitted,

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